

Before the
Federal Communications Commission

Washington, D.C. 20554

In re Applications of)	MM DOCKET NO. <u>93-107</u>
)	
DAVID A. RINGER)	File No. BPH-911230MA
)	
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB
)	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
)	
SHELLEE F. DAVIS)	File No. BPH-911231MA
)	
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC
)	
For a Construction Permit for)	
a New FM Station on Channel)	
280A at Westerville, Ohio)	

To: The Review Board

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REPLY TO EXCEPTIONS

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

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SUMMARY

Three of the remaining applicants filed Exceptions to the Initial Decision in this case and made arguments concerning David Ringer's application. Ringer responds to these arguments.

As a preliminary matter, Ringer notes the Court's decision in Bechtel v. FCC, where the Commission was ordered to refrain from utilizing its integration criteria. Given the Court's action, Ringer reserves the right to supplement his Findings and/or Exceptions upon the release of the FCC's new criteria and has limited this Reply to matters pertaining to his basic qualifications.

Ringer shows that the presiding Judge was correct to reject the addition of financial issues as requested by ORA and Davis. The record showed that Ringer made a good faith effort to budget for costs and has more than ample financial resources to meet his needs.

Likewise, Ringer demonstrates that the addition of two site availability issues against his application was not appropriate. Ringer had and continues to have a solid commitment from his tower site owner.

In addition, Mr. Ringer refutes the arguments that misrepresentation issues should have been added against him. As the Judge correctly recognized, Mr. Ringer made an honest mistake when he sought credit for certain local residences that were revealed in a detailed engineering study to be outside the service area of his proposed station.

Finally, Mr. Ringer counters the arguments that he should not have received credit for his auxiliary power proposal. Mr. Ringer shows that the Judge's decision granting him credit was correct for it has always been his intention to employ such equipment.

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To: The Review Board

REPLY TO EXCEPTIONS

David A. Ringer ("Ringer"), by and through counsel, hereby submits his Consolidated Reply to the Exceptions filed by the other remaining applicants to the Initial Decision, FCC 93D-22, released November 18, 1993, in the above-captioned proceeding. The Exceptions concerning Ringer's application are erroneous and are not supported by either record evidence or Commission precedent and should be denied. In support whereof, the following is shown:

PRELIMINARY MATTER

1. As a preliminary matter, it should be noted that, on December 17, 1993, the U.S. Court of Appeals for the D.C. Circuit issued its decision in Bechtel v. FCC, Case No. 92-1378, in which the Court ordered the FCC to forego using the

integration criteria for making licensing decisions. Each of the applicants make arguments in their Exceptions concerning what effect the Court's decision should have on the ultimate outcome in this proceeding.

2. Since the release of the Court's decision in Bechtel, the FCC has yet to issue any type of ruling staying the effectiveness of its integration policy or announcing a new set of comparative criteria. Therefore, it would be premature to speculate, as the other parties have, as to what method the Commission shall devise for future broadcast comparative proceedings. Therefore, in the interim, Ringer shall limit this Reply to those arguments raised against his basic qualifications (finances, site availability, truthfulness, etc.) and hereby reserves the right to supplement his Findings and/or Exceptions in this proceeding, upon the FCC's release of its new comparative criteria.

THE JUDGE CORRECTLY FOUND THAT RINGER IS FINANCIALLY QUALIFIED

3. Ohio Radio Associates, Inc. ("ORA"); Shellee Davis ("Davis"); and Wilburn Industries, Inc. ("Wilburn") argue that David Ringer was not financially qualified and that the Presiding Judge erred by failing to add financial qualifications issues against him. See ORA Exceptions at pp. 13-14; Davis Exceptions at pp. 4-9; and Wilburn Exceptions at pp. 12-13. These applicants have again raised an issue that was thoroughly considered by the Presiding

Judge and rejected on both timeliness grounds and on its merits.¹ The Judge's decision should be affirmed.

4. The chief argument raised by these applicants is that Ringer was not financially qualified because he failed to include certain items in his budget for the new Westerville station, such as the cost of a directional antenna, auxiliary power equipment, programming and payroll taxes.² However, as the Presiding Judge found, Davis and ORA "failed to show that Ringer has misrepresented his finances or grossly omitted some decisionally significant financial item that would render his proposal totally defective." MO&O I and MO&O II. Based upon the showings made in Mr. Ringer's Oppositions (including a balance sheet that showed he has maintained a net worth of between one and

¹ Both ORA's and Davis' Motions To Enlarge were denied by the Judge as untimely filed. With respect to ORA's Motion, the Presiding Judge found it to be "tardy in the extreme." See Memorandum Opinion and Order, FCC 93M-603, released September 22, 1993 ("MO&O I"). As for Davis' filing, the Presiding Judge concluded that it was "interminably late." See Memorandum Opinion and Order, FCC 93M-602, released September 22, 1993 ("MO&O II"). In both cases, the Judge noted that the parties had waited until the very last minute to file their Motion and that each was "obviously fishing for a Phase II hearing." Id.

² Davis also revives a far-flung argument concerning the sufficiency of the language contained in Mr. Ringer's Mid-Ohio tower site lease letter. See Davis' Exceptions at pp. 4-6. Davis argues that the letter, which states that "some or perhaps all" of the equipment of the former WBBY-FM may be made available to Mr. Ringer, was not sufficiently specific. Id. However, as previously shown by Mr. Ringer, the Mid-Ohio letter was specific as to all key terms and conferred upon Mr. Ringer "reasonable assurance" that the station's equipment would be available for Mr. Ringer's use, which is all the Commission demands of lease commitments.

half and two million dollars), the Presiding Judge rightly concluded that Mr. Ringer, who is self-financing his station proposal, "is financially qualified to follow through on his proposal." Id.

5. With respect to his directional antenna and auxiliary power equipment, Mr. Ringer showed that he mistakenly believed that this equipment was included in the inventory of equipment that was to be supplied by his tower site owner in consideration of Mr. Ringer's monthly lease payment.³ See Ringer's September 7, 1993 "Opposition To Motion Enlarge Issues of ORA" at p. 3 ("Opposition To ORA - Financial"). Mr. Ringer showed that, despite that the fact that it was accidentally omitted from his original budget, he always intended to have such equipment and his budget included a \$50,000 cushion for miscellaneous equipment that would more than cover these additional costs.⁴ The Presiding Judge correctly recognized these facts and rejected ORA's and Davis' arguments.

³ Like some of the applicants in this proceeding, Mr. Ringer proposes to operate his new station from the tower site of the former WBBY-FM which lost its license in 1991. Mr. Ringer proposed to lease the tower site and equipment of WBBY-FM from the previous licensee - Mid-Ohio Communications, Inc.

⁴ Davis challenged whether this equipment could actually be acquired for \$50,000. See Davis' Motion To Enlarge Issues at pp. 2-3. However, Ringer responded with price quotes from equipment dealers that showed that he could acquire a directional antenna for \$21,450 and auxiliary power equipment for \$15,274 for a total of only \$33,724. See Ringer's September 7, 1993 "Opposition To Motion Enlarge Issues of Davis" at Exhibit B ("Opposition To Davis - Financial").

6. As for payroll taxes, Mr. Ringer demonstrated that his original budget contained a typographical error and that "Payroll Taxes" were inadvertently listed as "Royalties and Licenses." See Opposition To ORA - Financial at p. 5. Therefore, Mr. Ringer showed that he did, in fact, budget for payroll taxes. Id. Furthermore, Mr. Ringer showed that the cost for "Royalties and Licenses" could be paid out of the \$1,200 cushion he included in his budget for miscellaneous monthly costs. Id.

7. Finally, ORA has once again challenged Mr. Ringer's omission of programming costs in his budget. However, Mr. Ringer has shown that he intends to enter into a barter arrangement with a programming supplier and, therefore, did not need to include an item for the cost of satellite programming in his budget. See Opposition To ORA - Financial at p. 5. Despite ORA and Davis's claims to the contrary, Mr. Ringer did produce a letter from the Unistar Network wherein they stated that they would be interested in a bartered programming arrangement. Id. at Attachment D.

8. Therefore, as these facts show, Mr. Ringer made a "serious and reasonable effort prior to filing...(his) application to ascertain the predictable costs of construction and operation." Armando Garcia, 64 RR 2d 2005, 1009 (Rev. Bd. 1988). His balance sheets, as supplied with his opposition filings, show that he has ample financial resources to follow through on his Westerville commitment.

The Presiding Judge was correct to find that the parties had not "pleaded with the required sufficiency and specificity to warrant adding the issue...." MO&O I and MO&O II. His interlocutory rulings in this respect should be affirmed.

THE JUDGE CORRECTLY FOUND THAT RINGER HAS REASONABLE ASSURANCE OF THE USE OF HIS TOWER SITE

9. In its Exceptions, ORA argues that the issues in this proceeding should have been enlarged to explore whether Mr. Ringer had reasonable assurance of the use of his proposed tower site. As was the case with the other pleadings filed by ORA against Mr. Ringer, its site availability Motion To Enlarge failed to raise "specific allegations of fact sufficient to support the action requested" and was properly rejected by the Presiding Judge. See Memorandum Opinion and Order, FCC 93M-393, released June 24, 1993 ("MO&O III").

10. As previously noted (see footnote 3), several applicants in this proceeding have proposed to lease the tower and equipment of WBBY-FM from its former licensee - Mid-Ohio Communications, Inc. Even ORA proposed to use the former WBBY site in its original application. In order to demonstrate "reasonable assurance" of the use of the WBBY-FM site, all of the applicants received the same form letter from Mid-Ohio's President, Carl Fry. In this letter, Mr. Fry stated: "Mid-Ohio Communications, Inc., hereby grants you the authority to specify WBBY-FM's transmitter location in your application." See Ringer's June 9, 1993 Opposition

To Motion Enlarge Issues at Exhibit 1 ("Opposition To ORA - Site"). The letter specifically referenced a dollar figure for the lease of the tower and station equipment (\$6,000 per month), described the exact location of the tower site and included a detailed inventory of equipment. Id. In response to ORA's pleadings, the remaining applicants proposing the WBBY-FM site also received an updated letter from Mr. Fry, wherein he reiterated Mid-Ohio's commitment. Id. at Exhibit 4. As these facts reveal, Mr. Ringer and the owner of his proposed site clearly had the requisite "meeting of the minds" for Mr. Ringer to make his site certification.

11. After reviewing the Fry letters, the Presiding Judge found that "Ringer clearly has reasonable assurance that its (sic) proposed transmitter site will be available." MO&O III. Despite this fact, ORA claims that the language contained in Mr. Fry's letter was not specific enough to constitute "reasonable assurance." ORA's arguments amount to nothing more than a game of semantics. ORA argues that the Mid-Ohio letter, which states that it is "willing to negotiate" a lease with Mr. Ringer, is not sufficient to confer "reasonable assurance." ORA Exceptions at pp. 23-24.⁵ However, Commission precedent is clear: applicants do

⁵ It should be strongly noted that when it certified its site availability in its original application, ORA was relying upon the very same letter from Mr. Fry to support its certification. Therefore, ORA should be hard-pressed to

not have to have a binding or absolute assurance of the availability of their transmitter site but only reasonable assurance. See Instructions To FCC Form 301 (June 1989 version) at page 9. The Commission has even stated that "...rent and other details may be negotiated at a yet undetermined future date..." National Innovative Programming Network, Inc., 2 FCC Rcd 5641, 5643 (1987). In this case, Mr. Ringer did all that the Commission expects of an applicant: He contacted the owner of his site, negotiated the key terms of his proposed tower and equipment lease (price - \$6,000 per month) and was granted permission, in writing, to specify the owner's site in his application. See Genesee Communications, Inc. 3 FCC Rcd 3595 (Rev. Bd. 1988). The site owner later reconfirmed these facts in a more recent letter supplied during the pendency of this proceeding. To expect anything more from Mr. Ringer in this case would be in direct contravention of long-standing Commission policy. The Judge noted this fact and correctly denied ORA's Motion.

RINGER DID NOT INTENTIONALLY MISREPRESENT HIS CLAIM FOR LOCAL RESIDENCE CREDIT

12. ORA and Davis argue that the Presiding Judge erred

challenge the suitability of this letter when it also believed the letter to be sufficient to support an affirmative site certification. See Opposition To ORA - Site at fn 7. Furthermore, ORA's current site availability letter is no more absolute than the Fry letter, in that it is not "a binding legal lease" and states that the site owner "will further negotiate the terms of the lease" upon a grant of ORA's application. Id at p. 8 and Exhibit 7.

by failing to add a misrepresentation issue against Mr. Ringer. ORA Exceptions at pp. 11-13 and Davis Exceptions at pp. 9-16. They argue that Mr. Ringer intentionally mislead the Commission by claiming credit for past local residences that were outside the service area of his proposed station. However, as the Presiding Judge found, Mr. Ringer was guilty of nothing more than making an honest mistake on the very close engineering analysis of where his local residences were located. See Memorandum Opinion and Order, FCC 93M-639, released October 7, 1993 ("MO&O IV"). While the Judge found that Mr. Ringer "has slovenly handled his local residence criterion," he nevertheless concluded that, based upon the record, "his error was inadvertant and not intentional" and that "No deceptive intent has been revealed." Id.

13. As the pleadings filed on this issue reveal, Mr. Ringer originally sought credit for seven local residences. See Davis Exceptions at p. 10. While attending the deposition of Ms. Davis, the issue was raised as to whether one of Ms. Davis' local residences was actually located within the service area of the proposed station, as that area was depicted in the Joint Engineering Exhibit. See Ringer's September 29, 1993 "Opposition To Motion To Enlarge Issues of ORA" at Exhibit A ("Opposition To ORA - Misrep"). As it turned out, the residence listed in Ms. Davis' Integration Statement was located outside the service area

and Ms. Davis was forced to file an amendment to withdraw this address. See Davis' Amendment filed July 13, 1993.

14. In light of this event, Mr. Ringer returned to his attorney's office and reviewed a copy of the Joint Engineering Exhibit before his own deposition to verify whether all of his claimed local residences were in fact located within the proposed service area. This examination revealed that some of Mr. Ringer's addresses were actually outside the service area. Mr. Ringer immediately prepared and amendment to remove these addresses from consideration. In support of his amendment, Mr. Ringer explained that he believed he could claim credit for these addresses because they were located "in areas where WBBY-FM could be received." See Ringer's July 16, 1993 "Petition For Leave To Amend."⁶ Mr. Ringer's amendment was not opposed and was later granted by the Presiding Judge. See Memorandum Opinion and Order, FCC 93M-500, released July 30, 1993.

⁶ Both ORA and Davis argue that Mr. Ringer has given conflicting explanation as to why he believed he could claim these residences. However, Mr. Ringer's responses were completely consistent. In his original Petition For Leave To Amend, Mr. Ringer stated that: "Since I was specifying the same antenna site that had been used by the former WBBY-FM, I believed that some of my past local residences were located in areas where WBBY-FM could be received." Later, in his Opposition to ORA's Motion To Enlarge, Mr. Ringer stated: "I believed that, if the signal of the proposed station could be heard at a specific location, then this location was considered part of the station's service area...." Opposition To ORA - Misrep at Exhibit A. A close examination of these two passages reveals no conflict whatsoever. Mr. Ringer simply stated that he believed he could claim credit for residences that were located in areas where the signal of the former WBBY-FM could be received or heard.

15. At this point, Mr. Ringer was claiming credit for three local residences - 1000 Urlin Avenue, 600 E. Town Street and 417 West Sixth Avenue. The question of whether each of these residences was located within the service area of the proposed station was a very close engineering call. See Joint Exhibit 1 at Figure 1. Mr. Ringer stated that he reviewed the Joint Engineering Exhibit Map and that it appeared that all three of these locations fell within the proposed station's service area. See Opposition To ORA - Misrep at Exhibit A. Not until a detailed engineering study conducted by Ms. Davis was introduced at hearing was it revealed that two of Mr. Ringer's local residences were actually slightly outside the service area.⁷

16. As these facts reveal, Mr. Ringer sought credit for local residences that he genuinely believed were within the proposed service area of his station. Contrary to ORA and Davis' contentions, there was no deceptive intent present in this case. Mr. Ringer simply was mistaken (as

⁷ ORA and Davis dispute Ringer's claim that these two residences were "slightly" outside the service area. However, as Davis' engineering study shows, Mr. Ringer's 600 E. Town address was located only 1 kilometer outside the service area. See Davis Exhibit 5. Likewise, his 1000 Urlin Avenue address was only 1.4 kilometer outside the service area. Id. Given the scale of the map involved (one inch equals approximately twelve kilometers), Mr. Ringer's addresses were approximately one eighth of an inch outside the service area, as depicted on the Joint Engineering Exhibit Map. The contour line as drawn on the map was itself one eighth of an inch wide. Therefore, it is entirely accurate to say that, as they appear on the Joint Engineering Exhibit Map, Mr. Ringer's addresses were "slightly outside" the service area of his proposed station.

was apparently Ms. Davis) in his belief that he could seek credit for residences located in certain areas. Furthermore, having subsequently reviewed the Joint Engineering Exhibit, Mr. Ringer honestly believed that two of his residences were located within the service area. Given the scale of the map in question, this belief was not unreasonable. It was not until later that his belief was proven incorrect by a highly technical engineering showing. Mr. Ringer never attempted to hide these mistakes from the other applicants and the other parties had ample opportunity to test the bona fides of his claim for local residence. See Garrett, Andrews and Letizia, Inc., 86 FCC 2d 1172, 1177 (Rev. Bd. 1981). Therefore, the facts in this case did not support the conclusion that Mr. Ringer knowingly, intentionally or willfully mislead the Commission and the Presiding Judge was correct to refuse the addition of a misrepresentation issue against Mr. Ringer. See Weigel Broadcasting Company, 2 FCC Rcd 1206, 1211 (1987); Fox River Broadcasting, Inc., 93 FCC 2d 127, 130 (1983) and Bluegrass Broadcasting Company, 43 FCC 2d 990, 994 (1973). His decision should be affirmed.

THE PRESIDING JUDGE WAS CORRECT TO AWARD RINGER CREDIT FOR AUXILIARY POWER

17. ORA, Davis and Wilburn argue that Mr. Ringer should not have received any credit for his proposal to supply auxiliary power at his studio and tower site. ORA Exceptions at pp. 10-11; Davis Exceptions at p. 19; and

Wilburn Exceptions at pp. 14-15. They claim that Mr. Ringer's original budget did not include a specific itemization for auxiliary power and, therefore, his auxiliary power proposal should not be credited. However, as recognized by the Presiding Judge, Mr. Ringer "made a good faith attempt to budget the costs of construction and operation of his station." See MO&O I and MO&O II. Mr. Ringer demonstrated that it has always been his intent to provide auxiliary power equipment for his station and, unlike the applicants in the cases cited by ORA, he made an effort to "budget" for auxiliary power. See Athens Broadcasting, Inc. 17 FCC 2d 452 (Rev. Bd. 1969) and Linda U. Kulinsky, 8 FCC Rcd 6235 (Rev. Bd. 1993). The Presiding Judge recognized these facts and correctly credited Mr. Ringer's auxiliary power proposal.

CONCLUSION

18. Since none of the other applicants have raised any arguments that would deny the grant of Ringer's application, their Exceptions in that respect should be denied.

WHEREFORE, the above-premises considered, David A. Ringer once again respectfully requests that his application for a Construction Permit for a new FM station at Westerville, Ohio be **GRANTED** and that the mutually exclusive

applications of ASF, Wilburn, Davis and ORA be **DENIED**.

Respectfully submitted,

DAVID A. RINGER

By:

A handwritten signature in dark ink, appearing to read 'Arthur V. Belendiuk', written over a horizontal line.

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January 5, 1994

CERTIFICATE OF SERVICE

I, Lori Paige DiLullo, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 5th day of January, 1994, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

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